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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## EMPLOYEE PAINTERS TRUST, *et al.*,

**Plaintiffs,**

V.

RIGGIO BROTHERS CONSTRUCTION,  
INC., *et al.*,

### Defendants.

Case No. 09-CV-01831-KJD-PAL

## ORDER

Before the Court is the Motion to Rank Claims on the Funds Deposited by Straub of Painters Trust Funds (“Painters”) (#112). Carpenters Southwest Administrative Corporation (“Carpenters”) filed an Opposition (#117 and #118) to which Painters filed a Reply (#123).

Also before the Court is the Motion to Dismiss of Straub Construction, Inc. (“Straub”) (#121). Painters and Carpenters opposed this Motion (#124 and #129) and Straub filed Replies (#128 and #131).

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1       Also before the Court is the unopposed Motion for Leave to File First Amended Complaint of  
2 Painters (#133).

3       The Court, having considered these Motions, Oppositions, and Replies rules on them  
4 together herein.

5 **I. Background**

6       On September 16, 2009, EMPLOYEE PAINTERS TRUST, PAINTERS VACATION  
7 TRUST, PAINTERS JOINT COMMITTEE, PAINTERS JOINT APPRENTICESHIP TRAINING  
8 COMMITTEE, PAINTERS INDUSTRY PROMOTION FUND, PAINTERS JOINT COMMITTEE  
9 INDUSTRY PROMOTION FUND, PAINTERS ORGANIZING FUND, PAINTERS LABOR  
10 MANAGEMENT COOPERATION COMMITTEE, PAINTERS LABOR MANAGEMENT  
11 COOPERATION INCENTIVE, PAINTERS HEALTH AND SAFETY AND UPGRADE  
12 TRAINING AWARD PROGRAM, and INTERNATIONAL UNION OF PAINTERS AND ALLIED  
13 TRADES INDUSTRY PENSION TRUST FUND, (collectively “Painters”), initiated a lawsuit  
14 against Defendants RIGGIO BROTHERS CONSTRUCTION COMPANY, INC. (“RBCI”), BIONE  
15 D. RIGGO, and WESTERN SURETY COMPANY for failure to pay fringe benefit contributions  
16 when due under its Collective Bargaining Agreement with the International Union of Painters and  
17 Allied Trades, District Council 15, Local No. 159.

18       RBCI failed to appear, and this Court entered a Default Judgment in favor of Painters against  
19 RBCI and Bione D. Riggo in the amount of \$174,326.36 on October 27, 2009. This amount  
20 represents delinquencies accrued for nonpayment of fringe benefit contributions due on various  
21 projects in southern Nevada. The Court issued Writs of Execution to the United States Marshals  
22 Service to execute on RBCI.

23       Plaintiff-in-Intervention Straub used RBCI as a subcontractor on two projects; one at Red  
24 Rock Canyon and the other at Nellis Air Force Base (the “Projects”). RBCI did not pay required  
25 fringe benefits for labor on the Projects. Straub held \$98,012.32 owed to RBCI for the Projects.  
26 After obtaining their Default Judgment against RBCI, Painters issued a Writ of Garnishment to the

1 Marhsal to serve on Straub and sought Application of Judgment against Straub. Straub filed its  
 2 Motion to Intervene which was granted, and then filed a Complaint in Intervention on October 6,  
 3 2010. The disputed funds (“Interpleaded Funds”) have been deposited with the Court.

4 RBCI also failed to pay fringe benefits due Carpenters while RBCI was under subcontract  
 5 with Straub on the Projects. Carpenters sent a letter notifying Straub of its liability for these  
 6 payments on October 1, 2009. Due to the retirement of one of Carpenters’ attorneys, Carpenters  
 7 failed to receive notice of Straub’s Complaint in Intervention and did not answer until February 7,  
 8 2011. Carpenters now claim an interest in the Interpleaded Funds for payment of fringe benefits  
 9 owed by RBCI on the Projects.

10 **II. Analysis**

11       **A. Dismissal of Non-Appearing Defendants**

12 Courts have held that “[a] named interpleader defendant who fails to answer the interpleader  
 13 complaint and assert a claim to the res forfeits any claim of entitlement that might have been  
 14 asserted.” Sun Life Assurance Company of Canada v. Conroy, 431 F.Supp.2d 220, 226 (D.Rhode  
 15 Island 2006) (citing Gulf Coast Galvanizing, Inc. v. Steel Sales Co., 826 F.Supp. 197, 203 (S.D.Miss.  
 16 1993)). See also Nationwide Mut. Fire Ins. Co. v. Eason, 736 F.2d 130, 133 (4th Cir. 1984).

17 The only Defendants who have answered the interpleader action are Painters and Carpenters.  
 18 Accordingly, non-answering Defendants Winroc Corp, Garrett Materials, ProBuild, LLC, Westside  
 19 Building Materials Las Vegas, Inc., Riggio Brothers Construction, Inc., Bione D. Riggio, and  
 20 Western Surety Company are dismissed with prejudice and may not assert a claim to the Interpleader  
 21 Proceeds.

22       **B. Claims to the Interpleader Proceeds**

23 There is no dispute between Painters and Carpenters that under Nevada law, labor claims  
 24 have priority above liens for other type of work and the claims of the parties against the Interpleaded  
 25 Funds are appropriate. See e.g. N.R.S. 108.236(1)(a); 624.270(4); 608.150(1). The only dispute  
 26 concerns whether Painters’ Default Judgment has priority over Carpenters’ claim for fringe benefits.

1 Courts are to “determine the priority of claims in an interpleader action as they existed at the time the  
2 action was initiated.” Texaco, Inc. v. Ponsoldt, 118 F.3d 1367, 1370 (9th Cir. 1997).

3 Carpenters sent its letter to Straub on October 1, 2009 providing notice of Straub’s liability  
4 under N.R.S. 608.150 for fringe benefit contributions from RBCI’s work on Projects. Painters  
5 obtained its Default Judgment on October 27, 2009 including claims attributable to the Projects as  
6 well as other work projects. Painters argues that its claim for satisfaction of its Default Judgment has  
7 priority because Carpenters only asserted its claim to the Interpledged Funds on February 7, 2011,  
8 when it filed its answer to the Interpleader Action filed by Straub.

9 In this case, the Interpledged Funds must first satisfy the labor obligations to both Painters  
10 and Carpenters attributable to the Projects. RBCI would have been entitled to the Interpledged Funds  
11 only after paying the fringe benefit contributions attributable to the Projects. Since Painters stands in  
12 the shoes of RBCI, the obligations related to the Projects have priority. See Union Bank v. Federal  
13 Deposit Ins. Corp., 899 P.2d 564, 567 (Nevada 1995) (holding that, in garnishment, a plaintiff simply  
14 stands in the shoes of his debtor). At the time this interpleader action was commenced, Carpenters  
15 had notified Straub of its claim on the Interpledged Funds under N.R.S. 608.150. Furthermore, since  
16 N.R.S. 608.150(1) provides that “every original contractor... is liable for the indebtedness for labor  
17 incurred by any subcontractor or any contractors acting under, by or for the original contractor,”  
18 Carpenters could still have a claim against Straub for the fringe benefits owed by RBCI. This would  
19 be contrary to the purpose of an interpleader action. See e.g. Aetna Life Ins. Co. v. Bayona 223 F.3d  
20 1030, 1034 (9th Cir. 2000) (purpose of interpleader is to protect stakeholders from multiple liability  
21 as well as from the expense of multiple litigation).

22 Accordingly, Painters should receive \$45,260.25 of the Interpledged Funds to satisfy its claim  
23 for fringe benefits attributable to the Projects. Carpenters, upon proper application to this Court, are  
24 entitled to \$26,735.54 of the Interpleader Funds. This constitutes the \$29,041.91 in fringe benefits  
25 attributable to the Projects owed, less \$2,306.37 already paid to Carpenters from the Bond Proceeds.  
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1 (See #98). The remainder of the Interpleaded Funds will be paid to the Painters in satisfaction of the  
 2 Default Judgment.

3           **C. Motion to Dismiss Straub**

4 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a Plaintiff's complaint for "failure  
 5 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short  
 6 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
 7 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require  
 8 detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation  
 9 of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan  
 10 v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the  
 11 speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint  
 12 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal,  
 13 129 S. Ct. at 1949 (internal citation omitted).

14 In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to  
 15 apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual  
 16 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
 17 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory  
 18 statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual  
 19 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially  
 20 plausible when the Plaintiff's complaint alleges facts that allow the court to draw a reasonable  
 21 inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint  
 22 does not permit the court to infer more than the mere possibility of misconduct, the complaint has  
 23 "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks  
 24 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,  
 25 Plaintiff's complaint must be dismissed. Twombly, 550 U.S. at 570.

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1       None of Painters' claims in its Complaint (#1) or counterclaims from its Answer to the  
2 Complaint in Intervention (#103) allege that Straub is liable for any amount other than fringe benefits  
3 contributions N.R.S. 608.150. As discussed supra, the Interpleaded Funds satisfy Straub's  
4 obligations under N.R.S. 608.150. Painters' pleadings do not show that it is entitled to further relief.  
5 Painters' formulaically state that RBCI, and by extention, Straub may be liable for more than the  
6 \$45,260.25 in fringe benefits owed, but the pleadings allege no facts to support this claim.  
7 Accordingly, Straub's Motion to Dismiss is granted and Painters' claims are dismissed without  
8 prejudice. If such facts exist, Painters Trust Funds is granted leave to amend its complaint as against  
9 Straub within 14 days.

10       **E. Attorneys' Fees**

11       The amount of fees to be awarded in an interpleader action is committed to the sound  
12 discretion of the district court. Trustees of Directors Guild of America-Producer Pension Benefits  
13 Plans v. Tise, 234 F.3d 415, 426 (9th Cir. 2000) (quoting Schirmer Stevedoring Co. v. Seaboard  
14 Stevedoring Corp., 306 F.2d 188, 194 (9th Cir.1962)). Since Attorneys' fees are deducted from the  
15 interpleaded fund, policy requires courts to consider the impact on the party who is ultimately  
16 deemed entitled to funds. Id.

17       Straub's position as Plaintiff-in-Intervention in this case was not that of an entirely  
18 disinterested party. Unlike most interpleader plaintiffs, Straub faced liability for the fringe benefit  
19 contributions owed by RBCI under N.R.S 608.150. By satisfying this obligation through the  
20 Interpleader Action, Straub eliminated this liability. Based on Straub's unique status in this action,  
21 the Court declines to award attorneys' fees to Straub.

22       **D. Motion to Amend**

23       Painters has filed its Motion for Leave to File First Amended Complaint. No opposition has  
24 been filed and accordingly the Motion is granted. Pursuant to this Order, Painters' First Amended  
25 Complaint should either remove Straub as a defendant, or set forth specific facts supporting claims  
26 against Straub.

1     **IV. Conclusion**

2         **IT IS HEREBY ORDERED THAT** the Motion to Rank Claims on the Funds Deposited by  
3 Straub of Painters Trust Funds (#112) is **GRANTED** in part and **DENIED** in part.

4         **IT IS FURTHER ORDERED THAT** the Motion to Dismiss of Straub Construction, Inc.  
5 (#121) is **GRANTED** in part and **DENIED** in part.

6         **IT IS FURTHER ORDERED THAT** the unopposed Motion for Leave to File First  
7 Amended Complaint of the Painters Trust Funds (#133) is **GRANTED**.

8             DATED this 18th day of July 2011.

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12             Kent J. Dawson  
13             United States District Judge  
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